

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 2, 2007

PATRICK McGEE v. TIMOTHY BEST, ET AL.

Appeal from the Chancery Court for Davidson County
No. 05-1515-II Carol L. McCoy, Chancellor

No. M2005-02631-COA-R3-CV - Filed on May 29, 2007

The plaintiff filed this action against a limited liability company and some of its members following the termination of his membership in and employment with the company. This is the third lawsuit filed by him arising out of the same set of facts. The plaintiff filed a notice of voluntary dismissal in this third case – a dismissal which the trial court ultimately found to be an adjudication on the merits. The court awarded the defendants a judgment against the plaintiff in the amount of \$2,475 for fees and costs associated with their defense of this action. The plaintiff appeals this monetary award. We reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Reversed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

G. Kline Preston, IV, Nashville, Tennessee, for the appellant, Patrick McGee.

Timothy K. Garrett, Nashville, Tennessee, for the appellees, McGee, Best, Frank & Ingram LLC, Timothy Best, Robert Frank, and Ingram Entertainment, Inc.

OPINION

I.

This case and two other cases related to it have a long and convoluted history. This saga began on January 4, 1999, when the plaintiff filed a lawsuit in the Davidson County Chancery Court against McGee, Best, Frank & Ingram, LLC (“the LLC”); Timothy Best; Robert Frank; David Ingram; and Ingram Entertainment, Inc. In that lawsuit (“McGee I”), the plaintiff challenged the termination of his membership in and employment with the LLC, asserting, among other claims, actions for breach of contract, fraud, breach of fiduciary duty, and misrepresentation.

After the discovery phase in McGee I had been completed, the trial court granted the defendants' dispositive motions and dismissed the plaintiff's complaint in its entirety. On appeal, this Court affirmed in part and reversed in part, remanding the plaintiff's action on the breach of contract claim "for a determination of whether plaintiff's employment termination was with or without cause and to determine the proper amount due to the plaintiff pursuant to the Operating Agreement." *McGee v. Best*, 106 S.W.3d 48, 67 (Tenn. Ct. App. 2002). The Supreme Court denied the plaintiff's application for permission to appeal. On the eve of the hearing on remand, the plaintiff filed a notice of voluntary dismissal. The trial court dismissed McGee I on September 24, 2003.

In February 2004, the plaintiff filed a second lawsuit against the bulk of the defendants in McGee I. This suit was filed in the Davidson County Circuit Court and sought an accounting and damages for breach of contract. Because the first lawsuit had been filed in chancery court, the circuit court transferred McGee II to the trial court – the Davidson County Chancery Court, Part II. The defendants subsequently filed a motion for summary judgment. That motion was set for hearing on May 13, 2005.

On April 8, 2005, each of the defendants in McGee II, as well as Ingram Entertainment, Inc. – which was a defendant in McGee I but not a defendant in McGee II – received a Davidson County Chancery Court summons with a copy of a complaint that the plaintiff had filed in Davidson County Circuit Court on June 30, 2004. The plaintiff had filed this third lawsuit ("McGee III") in the circuit court four months after he filed McGee II in that same court. In the new complaint, the plaintiff asserted claims of fraud, breach of fiduciary duty, and misrepresentation. These claims are identical to the fraud, breach of fiduciary duty, and misrepresentation claims asserted by the plaintiff in McGee I.

It is not clear why the defendants were served with a *chancery* court summons and a *circuit* court complaint; however, the defendants interpreted this service as an attempt by the plaintiff to amend the complaint in McGee II (1) to add additional causes of action, *i.e.*, fraud, breach of fiduciary duty, and misrepresentation, and (2) to add Ingram Entertainment, Inc. as an additional defendant. Based upon that interpretation, the defendants filed in the trial court an "Opposition to an Apparent Motion to Amend." In that pleading, the defendants argued that the attempted amendment would be futile because the same claims and issues had been dismissed by a final order in McGee I. In their pleading, the defendants sought an award of fees and costs for having to defend the claims asserted in McGee III. A hearing on this matter was set for May 13, 2005, which is the same day on which the motion for summary judgment in McGee II had been scheduled.

At the May 13, 2005, hearing, the trial court instructed the defendants' counsel to prepare an order granting the defendants summary judgment in McGee II. The trial court instructed the plaintiff's counsel to transfer McGee III from circuit court to chancery court and to consolidate it with McGee II. The court also instructed the plaintiff's counsel to be prepared to present authority supporting his view that a change in the law or in the interpretation of the law would allow the plaintiff to relitigate claims that had been dismissed in McGee I. The trial court further directed the

defendants' counsel to refile their "Opposition to an Apparent Motion to Amend" as a motion to dismiss after McGee II and McGee III were consolidated. The court stated that it was taking the defendants' request for fees and costs "under advisement."

Thereafter, the parties submitted an agreed order transferring McGee III from circuit court to chancery court. McGee III was then assigned to Chancery Court, Part IV. The defendants subsequently filed a motion to dismiss or, in the alternative, to transfer McGee III to the trial court, *i.e.*, the Chancery Court, Part II. The plaintiff opposed the defendants' motion to dismiss on procedural grounds, claiming that, in reality, the motion was a motion for summary judgment. He argued that the defendants had failed to comply with certain time restraints under the local rules. The plaintiff did not provide any substantive opposition or cite any authority that would allow him to relitigate the same causes of action that had been dismissed in McGee I. The plaintiff also opposed, without explanation, the defendants' alternative request to transfer McGee III to the trial court, even though such a transfer was consistent with the trial court's instructions to the parties at the May 13, 2005, hearing.

In September 2005, the parties appeared before the Chancery Court, Part IV, after which the presiding Chancellor ordered McGee III to be transferred to the trial court. In its pleadings before Part IV, the defendants again moved the court for fees and costs for having to defend McGee III.

After McGee III was transferred to the trial court, the defendants filed another motion to dismiss. Once again, the defendants sought fees and costs incurred for having to defend claims that were dismissed in McGee I. This motion was essentially the same motion that the defendants had previously filed as their "Opposition to an Apparent Motion to Amend." Hearing on the motion was set for September 30, 2005.

Four days before the hearing on the defendants' motion, the plaintiff filed a notice of voluntary dismissal in McGee III. The plaintiff also filed a response in opposition to the defendants' motion to dismiss and to their request for fees and costs. The plaintiff argued that the motion to dismiss should be denied because "the law had changed on the subject matter and the [p]laintiff has relied on the change in law pursuant to Rule 60 of Tennessee Rules of Civil Procedure." He argued that the defendants' request for fees and costs should be denied because the defendants had failed to comply with the requirements of Tenn. R. Civ. P. 11 by not giving him 21 days to remedy any alleged violation on his part.

The trial court entered an order of voluntary dismissal in McGee III on September 26, 2005. The court thereafter filed its memorandum opinion and order, finding that the plaintiff's voluntary dismissal in McGee III served as an adjudication on the merits because it was the plaintiff's second time dismissing "essentially the same claim against essentially the same parties." The court made the following findings and conclusions with respect to the defendants' request for fees and costs:

Based upon the affidavit of [the d]efendants' counsel, submitted in accordance with this Court's instructions, the Court finds that the

[d]efendants had to expend fees in the amount of \$8,942.00 in having to defend the causes of action in McGee III, and in having to go through several needless steps to have the dismissal motion heard in this Court. The Court finds that this amount is reasonable.

The Court notes that it cannot award monetary sanctions against a represented party for violation of Tenn.R.Civ.P. 11.02(2). Therefore, based upon the foregoing, and specifically based upon this Court's instruction to [the p]laintiff's counsel that he needed to be prepared with authority that supported [the p]laintiff's view and to date, [the p]laintiff's counsel has presented no such authority, the Court awards [the d]efendants the amount of _____¹ against [the p]laintiff's counsel. The Court finds that the causes of action in McGee III were not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law, and as such, these causes of action were presented in violation of Tenn.R.Civ.P. 11.02(2). As to [the p]laintiff's objection to the "safe harbor", the Court finds that [the p]laintiff had ample notice – from [the d]efendants and from this Court – dating back to the May 13, 2005 hearing (and the pleadings pertaining thereto) within which to evaluate the authority upon which [the p]laintiff was suing and to determine the lack of any reasonable basis for his claim. That time period amply satisfies the 21-day safe harbor.

The Court further finds that, even though this Court had ordered that McGee III be transferred to this Court for hearing on [the d]efendants' motion to dismiss, [the p]laintiff opposed the transfer of the matter to this Court from Part I[V], requiring that [the d]efendants' counsel [] file a motion to that effect and appear for hearing. The Court finds that this action by [the p]laintiff served only the improper purpose of unnecessary delay and needless increase in costs. For that reason, the Court awards judgment to the [d]efendants against [the p]laintiff for \$2475.00² for fees and costs associated with defending claims in McGee III.

The Court declines to impose Rule 11 sanctions ag[ainst the p]laintiff's counsel in the absence of a separate motion [Rule 11.03(1)(a)], and since the Court is barred from using its own

¹This blank was left empty by the trial court.

²This monetary figure and all of the quoted material that follows the word "for" after the figure was handwritten into the order by Chancellor Carol L. McCoy.

initiative to enter such an order [Rule 11.03(1)(b) and 11.03(2)(b)].
The [p]laintiff's counsel took a voluntary dismissal before the Court
could enter a show cause order.

(Underlining in original; paragraph lettering in original omitted; footnotes added). The plaintiff
appeals the \$2,475 judgment against him.

II.

The sole issue advanced by the plaintiff is whether the trial court erred in entering an award for fees and costs against him “without a basis and in violation of the procedural and substantive requirements of Rule 11 of the Tennessee Rules of Civil Procedure.” The facts material to this question are not in dispute; therefore, the subject issue raises a question of law. Our review of questions of law is *de novo* with no presumption of correctness attaching to the trial court's conclusions. **Campbell v. Florida Steel Corp.**, 919 S.W.2d 26, 35 (Tenn. 1996). We review a court's decision to impose a Rule 11 sanction under an abuse of discretion standard. **Krug v. Krug**, 838 S.W.2d 197, 205 (Tenn. Ct. App. 1992). A trial court abuses its discretion when its judgment has no basis in law or in fact, and is therefore arbitrary, illogical, or unconscionable. **State v. Brown & Williamson Tobacco Corp.**, 18 S.W.3d 186, 191 (Tenn. 2000).

III.

The plaintiff contends that the trial court erred in awarding the defendants a \$2,475 judgment against him. The courts of this state follow the American Rule, which provides that “litigants must pay their own attorney's fees unless there is a statute or contractual provision providing otherwise.” **Taylor v. Fezell**, 158 S.W.3d 352, 359 (Tenn. 2005). There are many state statutes authorizing an award of fees. *See, e.g.*, T.C.A. § 47-18-109(e)(1) (2001) (“Upon a finding by the court that a provision of [the Tennessee Consumer Protection Act] has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs.”); T.C.A. § 36-5-103(c) (2005) (stating that the plaintiff spouse may – at the discretion of the court – recover reasonable attorney's fees from the defendant spouse in enforcing any decree of alimony, child support, or custody arrangement); T.C.A. § 10-7-505(g) (1999) (authorizing an award of attorney's fees in a Public Records Act case if a governmental entity knows that certain records are public and willfully refuses to disclose them); T.C.A. § 67-1-1803(d) (2006) (authorizing an award of reasonable attorney's fees to the prevailing party in a tax case).

The trial court based its decision to award the defendants \$2,475 in fees and costs on its finding that the plaintiff's opposition to the transfer of McGee III from Chancery Court, Part IV to the trial court “served only the improper purpose of unnecessary delay and needless increase in costs.” As can be seen from the quoted material that follows, this language tracks language found in Rule 11 of the Tennessee Rules of Civil Procedure. *See* Tenn. R. Civ. P. 11.02(1). Rule 11 provides, in pertinent part, as follows:

Rule 11.02 Representations to Court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

* * *

Rule 11.03 Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision 11.02 has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision 11.02 or are responsible for

(1) How Initiated.

(a) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision 11.02. It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(b) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision 11.02 and directing an attorney, law firm, or party to show cause why it has not violated subdivision 11.02 with respect thereto.

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (a) and (b), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(a) Monetary sanctions may not be awarded against a represented party for a violation of subdivision 11.02(2).

(b) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(Bold print and italics in original).

Rule 11 sets forth two methods by which sanctions may be initiated – (a) by motion and (b) on the court's own initiative. Tenn. R. Civ. P. 11.03(1)(a), (b). It is not clear under which method sanctions were imposed in this case; consequently, we will discuss the requirements of both methods to ascertain whether the facts in this case satisfy the requirements of either regimen.

We first turn to the requirements for the imposition of Rule 11 sanctions based upon a party's *motion*. Rule 11.03(1)(a) requires that a motion for sanctions pursuant to Rule 11 must be made separately from other motions/requests and must describe the specific conduct alleged to be in violation of Rule 11.02. Tenn. R. Civ. P. 11.03(1)(a). The defendants never served the plaintiff with the required separate motion. *See id.* The defendants argue that the request for fees and costs stated in their "Opposition to an Apparent Motion to Amend" and subsequent pleadings satisfy this requirement. We disagree. These pleadings do not specifically request Rule 11 sanctions nor do they describe the specific conduct alleged to be in violation of Rule 11.02. *See id.* Furthermore, the

defendants' multiple requests for "fees and costs in defense of [McGee III]" were simply added to the end of other pleadings, pleadings which more generally address the merits of the plaintiff's claims.

Subdivision (1)(a) of Rule 11.03 provides for a 21-day safe harbor in order to afford a party an opportunity to remedy the alleged violation and thereby avoid the imposition of sanctions. *See id.* If the alleged violation is not remedied, and the trial court finds that sanctions are otherwise warranted, the court may then impose sanctions as well as expenses and fees incurred in presenting the motion for sanctions. *See id.* Even if we assume, for the sake of argument, that the defendants' pleadings satisfy the separate motion requirement, the defendants did not satisfy the 21-day safe harbor provision because they filed those pleadings with the trial court without first allowing the plaintiff time to remedy the alleged violation of Rule 11.02. *See id.* (stating that the motion for sanctions "shall not be filed with or presented to the court unless, within 21 days after service of the motion . . . , the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."). Given these facts, we find that the defendants failed to properly seek Rule 11 sanctions by motion.

We next turn to the procedure for imposing Rule 11 sanctions *on the court's own initiative*. Rule 11.03(1)(b) states that the court may, on its own initiative, "enter an order describing the specific conduct that appears to violate subdivision 11.02 and directing an attorney, law firm, or party to show cause why it has not violated subdivision 11.02 with respect thereto." Tenn. R. Civ. P. 11.03(1)(b). Subdivision 11.03(2)(b) further provides that the court cannot impose monetary sanctions on its own initiative "unless the court issues its order to show cause before a voluntary dismissal . . . made by or against the party which is, or whose attorneys are, to be sanctioned." *Id.* at (2)(b).

The trial court never entered a show cause order specifically describing the conduct it alleged to be in violation of Rule 11.02(1). *See id.* at (1)(b). The defendants assert that the trial court's instruction to the plaintiff's counsel to present authority supporting the plaintiff's attempt to relitigate the claims disposed of in McGee I satisfies this condition. We disagree. The instruction given by the court to the plaintiff's counsel at the May 2005 hearing addressed an alleged violation of Rule 11.02(2), *i.e.*, whether the allegations of a pleading "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Rule 11.03(2)(a) explicitly states that monetary sanctions cannot be awarded against a represented party, like the plaintiff, for a violation of Rule 11.02(2). Therefore, the trial court's action was contrary to the provisions of 11.03(2)(a) if, as argued by the defendants, the court based its monetary sanction against the plaintiff on its earlier instruction to the plaintiff's counsel.

The trial court stated in its order that it declined to impose sanctions against *the plaintiff's counsel* in this case because of the absence of a separate motion, *see* Tenn. R. Civ. P. 11.03(1)(a), and because the court was barred from using its own initiative to enter an order against the plaintiff's counsel in light of the fact that the plaintiff's counsel had filed a notice of voluntary dismissal before

the court could issue a show cause order. *See* Rule 11.03(1)(b) and 11.03(2)(b). We hold that the trial court's issuance of monetary sanctions against *the plaintiff* likewise violates Rule 11.03(1)(a), (b), and (2)(b). Because we have found no authority, other than Rule 11, for an award of attorney's fees in this case, and because the proper procedures for imposing sanctions under Rule 11 were not followed, we conclude that the trial court erred in granting the defendants a judgment against the plaintiff for fees and costs. Accordingly, the trial court award of \$2,475 against the plaintiff must be reversed.

IV.

This Middle Section case was first assigned to a panel of the Eastern Section on April 2, 2007. We regret that there was such a long delay in assigning this case to a panel of judges.

V.

The judgment of the trial court awarding the defendants \$2,475 in fees and costs associated with defending this case is hereby reversed. This matter is remanded to the trial court for the collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellees, Timothy Best; Robert Frank; McGee, Best, Frank and Ingram, LLC; and Ingram Entertainment, Inc.

CHARLES D. SUSANO, JR., JUDGE